ORIGINAL

SUPREME COURT, U.S.
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No. 82-6771

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

WILLIAM H. FLAMER,

Petitioner,

v.

STATE OF DELAWARE,

Respondent.

# BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

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## OPINIONS BELOW

1. The February 7, 1983 opinion of the en banc Delaware Supreme Court is as yet unreported. It is reproduced in the Appendix to Flamer's Petition for Certiorari [F. App.] at A. The opinion affirmed Petitioner's [Flamer's] convictions for first degree murder, robbery, theft, and possession of a deadly weapon, but reserved decision on his federal constitutional challenges to the sentence of death for the murders.

2. The February 18, 1983 order of the Delaware Supreme Court denying motions for reargument filed by both Flamer and Respondent [State] is reproduced at F. App. B.

3. The order of the Delaware Supreme Court, dated July 6, 1983, requesting additional briefing in this case is reproduced in the Appendix to this Brief in Opposition [S. App.] at 1a. That order requested the parties to submit additional argument on (1) the effect of the decision in Zant v. Stephens, 51 U.S.L.W. 4891 (U.S. June 22, 1983) on the unresolved death penalty challenges and (2) the abilitity of the state courts to continue exersing jurisdiction in light of this petition for certiorari.

## JURISDICTION OF THE COURT

Flamer asserts that this Court may review the February 7, 1983 opinion of the Delaware Supreme Court under its certiorari jurisdiction, 28 U.S.C. §1257(3) (1976). However, no final judgment has been entered by the state court on Flamer's murder convictions. In the absence of such a final judgment, this Court lacks jurisdiction. The State's

argument concerning lack of jurisdiction is made in more detail at pages 13-18 of this brief.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Flamer's Petition for Certiorari adequately recites the appropriate provisions involved except that in reference to 11 Del. C. §636, Flamer's Pet. for Cert. 6, the subsection designations have been omitted. The designation "(a)" should proceed the paragraph words beginning "A person is guilty..." and the designation "(b)" should proceed the paragraph beginning "Murder in the first degree...."

## STATEMENT OF THE CASE

### 1. THE MURDERS.*

On the morning of February 7, 1979, as snow was falling, Arthur Smith, following a daily routine, went to check on his his parents, Alberta and Byard Smith. The Smiths, elderly Social Security pensioners, lived alone.** When he arrived at their home, he noticed that his parents' automobile was missing. Inside, he found his mother and father dead on their blood-splattered living room floor. Each had died from repeated stabbings. Their television set was missing, the furniture was in disarray, and frozen food containers were strewn about the premises.***

Within a few hours after being summoned, the police discovered the Smiths' car abandoned on a street in an adjacent town.**** Observant residents gave the police a description of the man who had previously that morning left the car in the snow.***** When the police conveyed this description to a

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* Record citations shall be as follows:

ST - transcript of suppression hearing conducted October 29-31 and November 5, 1979.

TT - transcript of trial and death penalty hearing occurring January 28-31 and February 5-7, 12, 1980.

** TT19-20, 27-29.

*** TT20, 111. A subsequent autopsy of Byard Smith's body indicated that he had been stabbed 79 times. TT232-33. Seven or eight of the wounds had been made made by a small knife and the remainder by a larger bayonet-style knife. TT242. Alberta Smith had been stabbed 66 times. TT242. Twenty-five of those wounds could only have been produced by a large bayonet-style knife. TT242.

**** TT116.

***** TT34-40; 54-57.

member of the victims' family, she indicated that the description "fit" William Flamer. Flamer was a nephew of the Smiths and lived with his family near their house.* The police went to Flamer's residence. Flamer was not there, but during a search authorized by his grandmother, the police found, in Flamer's room, frozen food containers similar in appearance to those strewn around the victims' home. They also saw on the living room couch a blood-stained bayonet and discovered, in a closet, the Smiths' television set.**

Armed with the information, the police went to local Justice of the Peace Court to obtain a warrant for Flamers' arrest for murder in the first degree, 11 Del. C. §636.***

2. FLAMER'S ARREST.

While the paperwork was being completed for the warrant, the police learned that Flamer had been seen at a nearby tavern. Several officers were dispatched to apprehend him. En route, they encountered Flamer, Andre Deputy [Deputy] and another individual walking along the highway in the increasingly accumulating snow.**** Flamer and his companions were stopped and warned pursuant to Miranda.***** Flamer responded that he understood the content of those

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* TT121.

** TT122-26. Later scientific examination of the bayonet indicated that the blood on the blade was from a human. TT378. The bayonet also had fibers on it which were microscopically similar to those used in the clothing that Alberta Smith was wearing when she was killed. TT393.

*** TT133.

**** ST33; TT190-191, 210.

***** Miranda v. Arizona, 384 U.S. 436 (1966). ST192, 271.

warnings.* He was then taken, along with the two others, to the police barracks.**

When he arrived at the stationhouse at around 4:00 p.m., Flamer was again warned pursuant to Miranda. He affirmatively indicated that he understood the "rights" described by those warnings.*** Noticing what appeared to be blood on Flamer's coat, hands, and arm, the two detectives asked Flamer for an explanation of those markings.**** Flamer responded that late the previous evening Deputy had arrived at his residence in the Smiths' car. Deputy had then asked Flamer to accompany him back to the Smiths' residence to load their car with stolen property. Flamer said he did so, found the Smiths dead, and became splattered with blood when he removed frozen food items from the Smiths' house.*****

At the same time that Flamer was explaining the blood stains, Deputy was being interviewed by other police officers.

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* ST192, 271. Although one police officer recalled that one companion,Deputy, shrugged in response to a question concerning his understanding, another detective, who was also present, specifically recalled that Flamer responded affirmatively when asked if he understood the warnings. ST271.

** The police, from the number of wounds on the body, inferred that more than one person had participated in the killings.

*** ST36, 332-334; TT171, 212. Flamer admitted that when warned at the stationhouse, he responded, "I know my rights." ST444 (Flamer).

**** A field test indicated the stains were blood. ST38. Flamer also had fresh scratches on his chest and neck. TT216.

***** ST38, 271, 334; TT173.

Deputy had in his possession Byard Smith's social security card and a driver's license. When asked how he had obtained these items, Deputy replied that Flamer had given them to him at the bar.*

Having now heard Deputy's conflicting story, the police again interviewed Flamer.** He now said another individual, whom he identified as Johnny Christopher, had committed the slayings while Deputy and he were present. He then told the police that Deputy, who had previously given the name "Anderson," was in fact Deputy and was wanted on an outstanding murder arrest warrant from Wilmington, Delaware.***

By 7:00 p.m., with the snow outside deepening, the driving remaining hazardous, and the nearest justice of the peace court closed, the police left Flamer to spend the night at the barracks.**** The next morning, after breakfast, and without any further interrogation, two detectives took Flamer to the nearby Justice of the Peace Court 6 for his initial

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* ST198-99. Deputy also had two watches with him. One was later identified as belonging to Byard Smith. ST198-99.

** Prior to this interview, Flamer was again given warnings pursuant to Miranda and again affirmatively indicated he understood those warnings. ST200-201; TT261-62.

*** ST202; TT263. In the meantime, Deputy, when asked about Flamer's story, had indicated that he had been asleep the previous night when Flamer had come home asking if he wished to go to the victims' house to get liquor. Deputy said he refused and within an hour Flamer returned with a carload of items, including a television and frozen food. ST44. The next morning after "failing" a lie detector examination he had requested, Deputy drastically changed his story. He then stated that he was present at the victims' home but that Flamer had stabbed the Smiths. ST45.

**** ST42, 202.

appearance.* At the appearance, the magistrate informed Flamer of the charges and penalties, advised him of his rights, and committed him to jail in default of bond.**

Because no court personnel were available to transport Flamer to jail, he was remanded to police custody to be transported by a uniformed officer.*** He was returned to the police barracks and placed in a holding cell to await a uniformed officer's arrival.

As Flamer was waiting, one officer entered the cell and asked him if he believed in God and heaven and hell. When Flamer responded affirmatively, the officer said, "Well, then

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* Pursuant to Del. Super. Ct. Crim. R. 5(a), an officer making an arrest with or without a warrant, "shall take the arrested person without unreasonable delay before the nearest available Justice of the Peace in the county...." At the appearance before the Justice of the Peace, the arrested person is not called on to plead but the magistrate informs the person:

> of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of the general circumstances under which he may secure pretrial release. He shall inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The committing magistrate shall also inform the defendant of his right to a preliminary hearing. He shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided by statute or in these rules.

Del. Super. Ct. Crim. R. 5(b). A preliminary hearing is held within ten days in a different court.

** ST257, 276, 277, 342. Because Flamer never raised any Sixth Amendment right to counsel argument in the trial court, this record contains no detailed description of the actual events which occurred during the initial appearance. Flamer has never asserted that the magistrate did not comply with the procedures outlined in Rule 5(b).

*** ST258. While at the justice of the peace court, Flamer telephoned his mother. She arrived at the police station and talked to her son. TT484.

you're going to burn in hell unless you get straight with me about ... what happened yesterday."* Flamer then indicated, "OK, I'll talk to you."**

Immediately Flamer was taken to another room were he was again warned pursuant to Miranda. He affirmatively indicated he understood those rights and wished to give a statement.***

Flamer then outlined to the officers that Deputy and he had planned to rob the Smiths, that he had stabbed Byard Smith with a small knife, and that Deputy had stabbed both the Smiths with the large bayonet.**** He also indicated that he had dropped the knife he had used in the snow on the roadway when he had been arrested and that in the Smiths' car was a shotgun which had been carried by Deputy to the Smiths' residence.***** The police then found a small knife, bearing hairs similar in characteristics to Byard Smith's, along the roadway where Flamer had been arrested.****** In the trunk of

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* TT266. The entire statement is set out in the Delaware Supreme Court's February 7, 1983 opinion at 16-17. F. App. A 16-17.

** TT266. At the suppression hearing, the same officer testified, without contradiction by Flamer, that Flamer had called to him, saying he wanted to talk to the police and agreeing to tell the truth. ST203. Although the Delaware Supreme Court in its opinion said that this earlier testimony indicated a completely different exchange than that recounted at trial, F. App. A at 17, the two recitations can be read consistently. Indeed, at trial, Flamer testified that the officer spoke of "heaven and hell," left the cell, and was recalled by him. TT486.

*** ST204. The statement, including the warnings and express waiver, was tape recorded. It shall be referred to as Statement.

**** Statement 2-4, 11, 19.

***** Statement 3-4, 11.

****** TT359-60, 390-91.

the Smiths' car was the shotgun.*

3. THE STATE TRIAL AND APPELLATE PROCEEDINGS.

Flamer was charged in several indictments with robbery, theft, and possession of a deadly weapon during a felony.** In a separate indictment he was also charged with two counts of murder in the first degree in relation to each victim. For each victim, one count sought liability under 11 Del. C. §636(a)(1), an "intentional" killing, and a second count sought liability under 11 Del. C. §636(a)(2), a "reckless" killing during the commission of a felony.***

After a six day trial, the jury returned guilty verdicts on all four murder counts and the robbery, weapon possession, and theft (misdemeanor) charges. After a subsequent penalty hearing, the same jury returned a sentence of death for the murder convictions. The judge, pursuant to statutory mandate, sentenced Flamer to hang for the murders and subsequently, imposed consecutive terms of imprisonment of thirty years for the robbery, thirty years for possession of a deadly weapon, and two years for the misdemeanor theft.

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* TT274. The statement had other indicia of reliability when compared to subsequently developed evidence. Flamer's descriptions of the number and location of the wounds inflicted by the small knife and bayonet were consistent with the results of the autopsies. Moreover, his description that Alberta Smith, in defending herself, tore Deputy's watch from his arm dove-tailed with the facts that Deputy had a watch with a broken band and that a watchband pin was found near the victim's body.

** 11 Del. C. §§832(a)(1), 841, 1447, respectively. Flamer's Pet. for Cert. at 6-7.

*** Those statutory sections are set out Flamer's Pet. for Cert. at 6.

Flamer appealed all of the judgments to the Delaware Supreme Court.* After oral argument, that court, sua sponte, raised the issue of whether the police activity after the initial appearance violated the assistance of counsel provisions of the Sixth Amendment.** After additional briefing, the Delaware Supreme Court issued its February 7, 1983 opinion. That opinion rejected all of Flamer's challenges to his convictions of murder, robbery, weapons possession, and theft. However, the court declined to resolve any issues, including eleven challenges made by Flamer, concerning the death sentence until the final disposition of the then pending cases of Zant v. Stephens, No. 81-89 (U.S. Supr. cert. granted October 15, 1981) and Barclay v. Florida, No. 81-6908 (U.S. Supr. cert. granted November 8, 1982).*** Moreover, the Delaware Supreme Court indefinitely stayed the issuance of its mandate on any aspect of its opinion.****

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* The death sentence was subject to mandatory review by the Delaware Supreme Court. 11 Del. C. §4209(g).

** Flamer, Order ¶3(a)-(b).(September 15, 1982). S. App. at 3b-4b.

*** F. App. A. at 32-33. This Court has subsequently decided Zant and Barclay. Zant, 51 U.S.L.W. 4891 (U.S. Supr. June 22, 1983); Barclay, 51 U.S.L.W. 5189 (U.S. Supr. July 6, 1983).

**** Delaware has no procedural requirement for the entry of a separate document called a "judgment." Cf. F.R. App. P. 36. The document which directs the affirmance, reversal or modification of the judgment or order of the trial court is the mandate. Del. Supr. Ct. R. 19(a). Thus, although the February 7, 1983 opinion indicated that both the convictions and sentences on the robbery, weapons, and theft charges were affirmed, no mandate concerning those charges has been issued.

On July 6, 1983, the Delaware Supreme Court ordered additional briefing concerning the applicability of Zant to Flamer's sentence. The same order requested additional briefing concerning whether this pending petition for certiorari divests the state courts of continued jurisdiction over the entire litigation. The supplemental briefing is to be concluded August 25, 1983.*

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* Flamer, Order ¶1(A), (B) (July 6, 1983). S. App. 1a-2a.

## REASONS FOR DECLINING REVIEW

### 1. FLAMER'S MURDER CONVICTIONS, THE PROSECUTIONS AT THE HEART OF HIS PETITION, ARE NOT NOW FINAL FOR PURPOSES OF 28 U.S.C. §1257 (1976).

Motivated by the differing but linked concerns of (1) avoiding repeated, piecemeal review of a single case by this Court; (2) minimizing conflicts between the state and federal judiciaries; and (3) avoiding the premature, or possibly unnecessary, resolution of constitutional issues, Congress, since 1789, has granted this Court power to intervene in state litigation only after the highest state court in which a decision could be had has rendered a "[f]inal judgment or decree." 28 U.S.C. §1257 (1976). The requirement of a final judgment "is not one of those technicalities to be easily scorned." Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945).

While this Court, when called upon to review state court decisions which contemplate additional state proceedings, has recognized that in a very few circumstances a mechanistic approach to finality must give way to more pragmatic considerations, this Court has emphasized that the predicate for the pragmatic approach is that the "additional [state court] proceedings would not require the decision of other federal questions that might also require review by the Court at a later date," Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 477 (1975). In sum, a pragmatic approach to finality, so as to allow review of a state court decision rendered in the course of still ongoing state litigation, is only available where there is "no probability of piecemeal review with respect to federal issues." Flynt v. Ohio, 451 U.S. 619, 621 (1981).

In the arena of criminal prosecutions, finality traditionally accrues only upon the announcement of a definitive sentence. Flynt, 451 U.S. at 620; Parr v. United States, 351 U.S. 513, 518 (1956).* cf. Andrews v. United States, 373 U.S. 334 (1963) (where prior sentence vacated but resentencing not yet performed, no finality to judgment to support federal circuit court appellate jurisdiction).

In this case, the Delaware Supreme Court, by its February 7, 1983 opinion, affirmed Flamer's non-capital robbery, weapons, and theft convictions. It also rejected his challenges relating to his guilt on the murder charges. However, the Delaware Supreme Court did not decide, and indeed has not yet decided, any of Flamer's federal constitutional challenges to the death penalty and has not, under its obligatory duty to review, approved the jury's recommendation of death for the murders.**

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* See also, Bateman v. Arizona, 429 U.S. 1302, 1306 (Rehnquist, Circuit Justice, 1976) (State court order vacating post-trial dismissal and ordering entry of conviction and mandating sentencing was not final judgment).

** Under Delaware's capital sentencing scheme, jury determinations of death must be reviewed by the Delaware Supreme Court, even in the absence of an appeal by the defendant. 11 Del. C. §4209(g)(1). Regardless of any other challenges which may be raised, the State Supreme Court is obligated, in all cases, before upholding a death sentence, to review the evidence and find (1) that the death penalty was not imposed arbitrarily or capriciously, (2) that the penalty in the particular case is not disproportionate as compared to similar cases, and (3) that the jury's determination of a statutory aggravating circumstance was sufficiently supported by the evidence. 11 Del. C. §4209(g)(2)a., b; State v. White, 395 A.2d 1082 (Del. 1978). While the last function fits comfortably within a traditional appellate review model, the first two functions, as they impose a decision making duty beyond that which the sentencing jury undertook and require the assessment of differing information not presented below, make the State Supreme Court an active participant in the determination of the sentence. Indeed, any recommendation of death by a jury cannot be carried out until those review functions have been completed. 11 Del. C. §4209(f). Thus, as a matter of state law, no sentence of death exists until the end of mandatory review process by the Delaware Supreme Court.

Given the absence of a definitive ruling concerning the legality of Flamer's sentence by the highest state court with the capacity, and indeed the obligation, to review the trial court judgment, no "final judgment," in the traditional sense, exists as to Flamer's liability for murder in the first degree.

Secondly, the nature of the future proceedings scheduled to be conducted by the Delaware Supreme Court, preclude utilizing a pragmatic approach to accord finality to the February 7, 1983 decision. Still pending for resolution by the Delaware Supreme Court are Flamer's eleven challenges to the recommended sentence of death.* Each argument has federal constitutional underpinnings. The predicate for using the pragmatic approach, the absence of other federal constitutional issues to be decided, has not been satisfied.**

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* The "Summary of Argument" from Flamer's brief in the Delaware Supreme Court outlining the nature of these challenges is reproduced at S. App. 7c-9c.

** It is the present existence of other federal constitutional claims not yet resolved by the state courts which distinguishes this case from Brady v. Maryland, 373 U.S. 83, 85 n. 1 (1963). There, this Court held that a state court decision, arising in state collateral attack proceeding, which vacated a sentence of death and ordered a new trial limited solely to the issue of whether to again impose death was "final" under 28 U.S.C. §1257. It was found final despite the fact that the state decision contemplated additional state trial proceedings. However, in Brady, no additional federal constitutional issues were outstanding when the prisoner asserted his constitutional claim concerning the scope of the state court's order mandating a new hearing. Thus, piecemeal review by this Court of federal constitutional issues in the course of a single case was not probable. In contrast, if the issues now presented by Flamer were to be reviewed and rejected, this Court, most assuredly, will be called upon to resolve the now pending death issues. Moreover, the practical concerns arising from the procedural posture of Brady which may have urged a determination that the judgment was final are not

Moreover, a decision according finality to the decisions concerning guilt in the murder convictions without awaiting state court resolution of the additional pending federal issues on death threaten, and indeed may have already caused, a corrosive effect on harmonious state-federal relationships. The filing of this petition has caused the Delaware Supreme Court to now question whether it may proceed not only to resolve the federal constitutional challenges to the death penalty but also to perform its statutory obligation to review the penalty for its fairness. See Flamer, Order ¶1(B) (July 6, 1982) ["Does this Court now have jurisdiction in the above captioned cases in view of the petition for certiorari now pending in the U.S. Supreme Court in each case?"]. S. App. 2a.

Secondly, in the context of the second question presented by Flamer for review, postponing the decision whether to review until resolution of the death penalty issues will not

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present here. In Brady, if the defendant, without obtaining Supreme Court review, had undergone the limited remand penalty hearing and had been sentenced to life, he might have been deterred from pursuing the original issue for fear that at a third full trial on guilt and penalty the new jury might impose death. cf., Fay v. Noia, 372 U.S. 391 (1963) [no waiver of appeal where fear of death penalty on retrial motivated decision.] Here Flamer would not suffer any such "grisly choice" if review of his present challenges is postponed until the final determination concerning the sentence of death. If the Delaware Supreme Court approves the sentence of death, his guilt and penalty challenges can be reviewed at that time. If the present death penalty is vacated, any subsequent jury determination failing to impose the death sentence could not be subsequently increased. Bullington v. Missouri, 451 U.S. 430 (1981). Flamer thus could then, without fear of any possible future grisly consequences upon retrial, assert the claims he now offers.

only sharpen the constitutional issue presented but may avoid an unnecessary, and possibly purely advisory, constitutional decision. In his second question, Flamer asserts that principles of double jeopardy precluded him from being convicted and sentenced consecutively under four counts of first degree murder based on different subsections of the same statutory section, 11 Del. C. §636. Suggesting that there is no indication that the Delaware legislature intended that he be sentenced to die twice for the death of each victim, Flamer concludes that, in the absence of such legislative direction, the multiple punishment prong of the double jeopardy clause has been violated. Flamer's Pet. for Cert. at 17.

Obviously, resolution of that issue is keyed to the actual sentences Flamer receives. If the Delaware Supreme Court does in fact "approve" the recommendation of death, his multiple punishment argument lapses into a non-sensical contention that the double jeopardy clause bars a second execution of Flamer. If the death penalty is vacated and eventually replaced by terms of life imprisonment* the number of such terms will only then be determined.** It is the configuration of those terms, now merely a matter of speculation, which will have to pass double jeopardy muster.

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* Under Delaware law, a person convicted of first degree murder, if not sentenced to die, is sentenced to imprisonment for the remainder of his natural life without benefit of probation, parole, or other reduction. 11 Del. C. §4209(a), (d)(3).

** Indeed the State may agree to the entry of one general mandatory life sentence for each victim covering both statutory subsections. The end result would be only two consecutive life terms of imprisonment.

To grant review on a multiple punishment question without any definitive resolution of what the punishments in fact are would be to grant review to a hypothetical.

In the absence of a definitive resolution by the Delaware Supreme Court of Flamer's remaining federal constitutional challenges to the death penalty, and the consequent lack of any final sentence on the murder charges, no final judgment supports this Court's jurisdiction under 28 U.S.C. §1257(3). As to those convictions, the petition should be dismissed for want of jurisdiction.*

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* As noted earlier, Flamer was convicted and sentenced in the trial court for murder, robbery, weapons possession, and theft. The Delaware Supreme Court affirmed both the convictions and sentences for the latter three charges but stayed its mandate as to all the offenses, F. App. A at 33, clearly evidencing its desire to treat all the charges as a single unit. Cf. United States v. Wilson, 440 F.2d 1103 (5th Cir.) (judgment not final where sentence imposed on some but not all counts), cert. denied, 404 U.S. 882 (1971). Flamer's petition is less than clear concerning which charges he seeks to have reviewed. Clearly, his second question pertains only to the murder charges. Thus, in practical terms, this petition is about the murder charges. Even if the February 7, 1983 opinion constitutes a final judgment for the robbery, weapons, and theft convictions, the appropriate course for this Court is to acknowledge that this is a murder case and deny the petition as it may, in its first question presented, encompass the non-murder convictions. If the murder judgment, upon properly timed review, is affirmed, those additional charges are superfluous. Death would moot their terms of imprisonment and the alternative murder sentence of life imprisonment without parole effectively does the same. If the murder convictions would be reversed on issues applicable to these other convictions, Flamer could utilize Delaware's post-conviction remedy, Del. Super. Ct. Crim. R. 35(a), to obtain new trials.

2. THE STATE COURT APPLIED THE CORRECT, WIDELY RECOGNIZED STANDARD FOR DETERMINING WHETHER PETITIONER COMPREHENDED HIS RIGHT TO COUNSEL.

Flamer argues that the Delaware Supreme Court committed constitutional error when it determined that he had waived his Sixth Amendment right to the assistance of counsel during his face-to-face questioning session occurring after his initial appearance before the magistrate.* Citing United States v. Mohabir, 624 F.2d 1140 (2nd Cir. 1980),** Flamer urges that because "waivers of Sixth Amendment rights must be measured by a 'higher standard' than are waivers of Fifth Amendment rights," id. at 1146, "[w]arnings by law enforcement officers and subsequent action by the accused that might suffice to comply with Fifth Amendment strictures against testimonial compulsion [do] not necessarily meet the higher standard with respect to waiver of the right to counsel that applies when the Sixth Amendment has attached." Id. at 1147, quoting United States v. Massimo, 432 F.2d 324, 327 (2nd Cir. 1970) (Friendly,

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* The state court assumed over strenuous objection by the State that the right to the assistance of counsel under the Sixth Amendment, as it incorporates a shield function for the suspect, attached at the time of the initial appearance. By urging that the state court's waiver analysis was correct, the State does not abandon its argument that the perfunctory initial appearance did not mark the appropriate onset of adversarial procedures so as to implicate the Sixth Amendment's guarantee of counsel.

** The citation of Mohabir apparently seeks to invoke this Court's discretionary review under Supr. Ct. R. 17.1(b) (conflict between state court and federal court of appeal). He also alleges, apparently to invoke review under Rule 17.1(c), that this case "is very similar to Brewer v. Williams, 430 U.S. 387 (1977). Flamer's Pet. for Cert. at 12-13. However, Brewer focused not on the issue of the suspect's "comprehension" of his Sixth Amendment rights for purposes of waiver but his "relinquishment" of that protection. Here, Flamer's contention goes only to the "comprehension" element.

J., dissenting), cert. denied, 400 U.S. 1022 (1971). From the above premise, Flamer argues that, in a face-to-face questioning encounter with known police officers, a suspect's express acknowledgement of Miranda warnings cannot be deemed sufficient to satisfy the comprehension element of a waiver of the Sixth Amendment right to counsel. Flamer's Pet. for Cert. at 13-15.* Flamer argues that despite (1) the findings that he had been advised of his right to counsel during questioning three times prior to the direct encounter with police after the initial appearance, (2) his own testimony that he knew his rights, and (3) the fact that he had been again advised of his right to the presence of counsel immediately prior to the questioning resulting in his statement,** the State court could

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* Although not expressly articulated in his petition, the thrust of Flamer's argument is that no comprehension element can be satisfied unless the police give the following warnings:

> that a criminal indictment has been filed, with explanation of the significance of that fact; that the results of the defendant's case could be seriously affected by any statements he makes at this time; that defendants customarily obtain the advice of lawyers in these circumstances, and that a lawyer would be better able to understand and advise the defendant as to the desirability and the dangers of making statements and answering questions.

Mohabir, 624 F.2d at 1152 n. 12, quoting United States v. Callabrass, 458 F. Supp. 964, 967 (S.D.N.Y. 1978).

** These final warnings distinguish this case from the facts in Brewer. In Brewer, the substantially incriminating "statements" made by Williams after the now infamous "Christian burial" speech were his inquiries concerning the discovery of the victim's clothing and his directions to the police to the location of the victim's body. Those "statements" were not preceded by any immediate warnings. In contrast, in this case, after the police officer spoke to Flamer in his cell concerning "heaven and hell," Flamer made no immediate incriminatory response which was used in trial. Rather, the incriminatory statements were made

not, in the absence of proof that the police gave additional warnings beyond those mandated by Miranda, determine that he comprehended his right to the assistance of counsel.

Initially, the Second Circuit's conclusion that waivers of the Sixth Amendment right in a custodial questioning scenario must be measured by a "higher standard" than waivers of Fifth Amendment or Miranda rights is not one which has been adopted by other federal circuits. Indeed, other circuits have held that in confrontations between known government agents and the suspect, the giving of Miranda warnings, either by the police or by a magistrate at the initial appearance, and a subsequent Miranda "waiver" satisfies the comprehension component for a valid pretrial waiver of the right to counsel under the Sixth Amendment. See, e.g., United States v. Monti, 557 F.2d 899, 903-904 (1st Cir. 1977); United States v. Cobbs, 481 F.2d 196, 199 (3rd Cir.), cert. denied, 414 U.S. 980 (1973); Government of Canal Zone v. Peach, 602 F.2d 101, 104 (5th Cir.), cert. denied, 444 U.S. 952 (1979); United States v. Woods, 613 F.2d 629, 634 (6th Cir.), cert. denied, 446 U.S. 920 (1980); Moore v. Wolff, 495 F.2d 35, 36-37 (8th Cir. 1974); United States v. Mandley, 502 F.2d 1103, 1104 (9th Cir. 1974). Similarly the state courts have not adopted a higher burden for establishing waiver of the right to counsel

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in response to direct questions. Those questions were not asked until Flamer had again been warned pursuant to Miranda, had affirmatively indicated he understood those rights, and had affirmatively indicated he wished to answer questions. Statement at 1.

under the Sixth Amendment than that required by Miranda. See, e.g., Shreeves v. United States, 395 A.2d 774, 780-81 (D.C. App. 1978), cert. denied, 441 U.S. 943 (1979); Fryer v. State, 325 N.W.2d 400, 411-12 (Iowa 1982); State v. Carter, 412 A.2d 56, 60-62 (Me. 1980); State v. Norgaard, 653 P.2d 483, 485-88 (Mont. 1982); Jordan v. State, 287 N.W.2d 509, 515 (Wisc. 1980).*

Nor do the opinions of this Court suggest that, in a face-to-face encounter with revealed government agents, where the agents' purpose is readily perceivable, the police must give warnings concerning the presence of counsel in language more detailed than Miranda as an absolute prerequisite to a determination that the suspect comprehended his right to counsel.** In Brewer, the police had given Williams Miranda

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* Indeed the Second Circuit's position may not have precluded a finding of comprehension in Flamer's case. In Mohabir, 624 F.2d 1148-49, 1151 n. 11, the Second Circuit distinguished its earlier decision in United States v. Lord, 565 F.2d 831, 839-40 (2nd Cir. 1977). In Lord, a panel found that its higher standard for Sixth Amendment comprehension waiver had been satisfied because the suspect had signed a Miranda waiver form and was "familiar with his rights" because of three prior arrests. It was this finding of familiarity which represented a reinforcement of the Miranda warnings sufficient to satisfy a higher standard of waiver. Mohabir, 624 F.2d at 1150 n. 8. There is little difference between a reinforcement evidenced by the fact of previous arrests and a reinforcement evidenced by Flamer's own testimony that "he knew his rights," particularly when Flamer had previously been arrested and convicted. ST463.

** In both Miranda and its Sixth Amendment holdings, this Court has held that waiver was to be measured in accordance with the test articulated in Johnson v. Zerbst, 304 U.S. 458 (1938). This use of a similar analysis for Miranda suggests that a Miranda waiver satisfies comprehension concerns involving the Sixth Amendment in the context of a face-to-face encounter with known police officers.

warnings upon his surrender, a judge had reiterated them at an initial appearance, and the police had finally repeated them prior to the cross-Iowa trip. In light of that, this Court easily concluded, without any indication that additional warnings were needed, that Williams "had been informed of and appeared to understand his right to counsel." Brewer, 430 U.S. at 404.* It found the difficult issue not comprehension but relinquishment.

Moreover, this Court's summary reversal in McLeod v. Ohio, 381 U.S. 356 (1965)** does not support the Mohabir higher standard for waiver analysis. In contrast to Williams in Brewer and Flamer here, McLeod had not been informed at any time during his police questioning of any right to the assistance of counsel.***

This Court has never suggested that the prosecution must, as a prerequisite for showing a waiver by the suspect of the Sixth Amendment's right to the assistance of counsel in a

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* In dissent, Justice White also indicated that the issue was not one of comprehension but relinquishment.

> "That [Williams] knew of his right not to say anything to the officers without advice and presence of counsel is established on this record to a moral certainty. He was advised of that right by three officials of the State - telling at least one that he understood the right - and by two lawyers."

Brewer, 430 U.S. at 433-34 (White, J., dissenting).

** Reversing, State v. McLeod, 203 N.E.2d 349 (Ohio 1964).

*** State v. McLeod, 203 N.E.2d at 353 (Gibson, J., dissenting) ["It can be safely assumed that the chief deputy sheriff and the assistant prosecuting attorney did not advise defendant of his right to counsel or the Court of Appeals would certainly have noted this fact"]. McLeod proceeded Miranda.

pre-trial face-to-face encounter with known police authorities, prove that the police gave additinal warnings beyond those announced in Miranda.* Rather, if valid warnings under Miranda have been given and a Miranda waiver found, a valid waiver of Sixth Amendment rights in a face-to-face encounter is not foreclosed.**

Flamer has chosen by his petition to call into question the state court's conclusion that he comprehended his right to the assistance of counsel during the post-initial appearance questioning. He makes no challenge concerning the State

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* Cf. United States v. Henry, 447 U.S. 264, 273 (1980) ["An accused speaking to a known Government agent is typically aware that his statements may be used against him. The adversary positions at that stage are well established; the parties are then 'arms length' adversaries."] The decision in Estelle v. Smith, 451 U.S. 454 (1981) does not support Flamer's higher standard argument. Smith was faced with a psychiatric examination, Flamer with direct police questioning. Smith did not know that one actual purpose for the exam was to obtain incriminatory information nor could he, as a layman, quickly determine what responses would "hurt" him if the psychiatrist would be called to testify on his future dangerousness. In contrast, Flamer could appreciate the incriminatory thrust of the direct police questions. Moreover, no warnings concerning counsel were given Smith. Flamer had been several times warned about is right to consult with counsel and have him present during any police questioning.

** In the absence of custodial interrogation where Miranda warnings are required, the police may, in situtations where the Sixth Amendment right to the assistance of counsel has attached, be required to show similar warnings in order to establish a waiver.

court's findings relating to the "relinquishment" element of waiver.* The narrow issue he presents does not pose substantial and important issues which this Court should decide. The petition should be denied.

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* Indeed, although Flamer in a pretrial suppression motion contended unsuccessfully that his final statement was involuntary, he never pressed that argument in his appeal. Rather, his only direct challenge to the confession was that it was obtained after an unreasonable delay after arrest in violation of Delaware's version of the prophylactic McNabb-Mallory rule. Moreover, here the facts concerning relinquishment are different than in Brewer. First, Flamer, in contrast to Williams, had consistently, before his initial appearance, chosen to communicate with the police concerning his knowledge of the crimes and Deputy's participation. Secondly, he did not share the personal characteristics of Williams which would have made the police mention of "heaven and hell" a compelling tug, skewing his ability to rationally determine whether to respond to the subsequent police interrogation. Finally, he was given additional warnings before he made any incriminatory statements.

### 3. THE SECOND QUESTION PRESENTED IS NOT RIPE FOR DECISION OR IS WITHOUT SUBSTANTIAL MERIT.

In a single indictment, a Delaware grand jury charged Flamer with murder in the first degree, 11 Del. C. §636(a) for the killing of Alberta and Byard Smith. For each victim, the indictment charged in one count that Flamer intentionally caused death by stabbing the victim in violation of subsection (a)(1) of 11 Del. C. §636. In a separate count, the indictment charged that Flamer recklessly caused death during the commission of a felony in violation of subsection (a)(2) of 11 Del. C. §636 by stabbing the victim. As the Delaware Supreme Court below noted, the two subsections above do not necessarily require the State to establish identical facts to impose criminal liability for murder in the first degree. Thus liability can be imposed under subsections (a)(2) by the State establishing (1) a reckless state of mind by the accussed concerning the resulting death and (2) that the death occurred during the commission of a felony. In contrast, liability can only be imposed under subsection (a)(1) if the accused intentionally caused death. The latter provison thus requires proof of a higher degree of culpability. Yet, because the State may demonstrate the culpable state of recklessness under subsection (a)(2) by demonstrating the higher culpability of intention,* the State's evidence under the two subsections may

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* 11 Del. C. §253 ["When recklessness suffices to establish an element of the offense, the element also is established if a person acts intentionally or knowingly"].

overlap.*

Here, the jury returned verdicts of guilty "as charged" under each of the separate counts for the two victims.** When the jury, after a separate penalty hearing, returned a verdict of death,*** the trial judge imposed a sentence of death on all four murder counts.****

Flamer's petition is less than clear concerning how the double jeopardy prohibition is implicated. If his argument is that the four verdicts of guilty allowed multiple punishments of death, the argument is (1) premature because, as noted before, the state Supreme Court has not approved any death sentence; (2) non-sensical, because it seeks to forbid a factually impossible sentence, a second death sentence; and (3) unsupported by the trial record which suggests the trial judge

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* Where the State demonstrates the lesser culpability of recklessness under §636(a)(2) by establishing intention, the elements of §636(a)(1) are "included," in a broad sense, within §636(a)(2). However, §636(a)(1) is not a lesser offense as regards penalty since both subsections define murder in the first degree.

** The jury had also been charged to consider the lesser included crime of second degree murder on the two counts of intentional killings. Under that section, 11 Del. C. §635, the required culpability is a reckless killing evidencing a cruel, wicked indifference to human life. The jury was instructed to consider such a second degree verdict only if they determined that the State failed to establish all the elements of an intentional killing under §636(a)(1). In light of that instruction and the jury's return of verdicts of guilty for intentional killings, the jury logically found the necessary reckless state of mind required by §636(a)(2) by finding intentional killings.

*** The jury answered special interrogatories specifying which statutory aggravating circumstances it found as to each count of murder.

**** TT643 ["On Counts I, II, III, and IV ... the same will be the same in accordance with the laws of the State of Delaware as enacted by the General Assembly."]

entered a general single conviction and sentence on all four murder verdicts.

While a multiple punishment argument gains a greater degree of credence if Flamer is sentenced to four consecutive life sentences, that issue is simply not now presented. If the death penalties are vacated, Flamer can then address the problem he perceives to the state courts for possible resolution.*

On the other hand, if Flamer's argument is that the mere charging of alternate theories of liability in separate counts violates double jeopardy principles, he is advancing an argument without any reasonable foundation.** "A draftsman of an indictment may charge crime in a variety of forms to avoid fatal variance of the evidence." United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 225 (1952). See also, Dealy v. United States, 152 U.S. 539, 542 (1894). The error of multiplicity cannot be equated with a double jeopardy transgression. The "[d]ecision as to the unit of punishment is not controlled by the form of the indictment ... 'multiplicitous never places a defendant in jeopardy of multiple sentences.'" United States v. Ketchum, 320 F.2d 3, 8 (2nd Cir. 1963), quoting, United States v. Mamber, 127 F. Supp. 925, 927 (D. Mass. 1955), Here, because Flamer was not

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* One possible resolution would be the entry of one general conviction for murder and the imposition of consecutive life term sentences for each victim. Indeed, because the alternative sentence for first degree murder is imprisonment for the balance of the defendant's life without possibility of parole, probation, or other reduction, 11 Del. C. §4209(a), the imposition of consecutive terms of such imprisonment will have no practical terms to extend incarceration.

sentenced to serve a penalty in excess of that prescribed under 11 Del. C. §636, the mere fact that the prosecution chose to assert different ways of committing the offense in the indictment does not offend any double jeopardy prohibition.*

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* Flamer cites no cases in support of his contention that a possible multiplicity pleading violation results, by itself, in a double jeopardy violation. Indeed, the case law does not support such an argument. See e.g., State v. Crump, 654 P.2d 922, 926-28 (Kan. 1982); State v. Silhan, 275 S.E.2d 450, 461-62 (N.C. 1981).

## CONCLUSION

Because no final judgment has been entered by the state court, this petition should be dismissed for want of jurisdiction. In the alternative, the petition should be denied since it does not exhibit any special or important reason which compel this Court to reconsider the conclusions of the Delaware Supreme Court.

Respectfully Submitted:

Gary A. Myers 7-15-83

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State of Delaware
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Georgetown, Delaware 19947
(302)856-5353

DATE: July, 1983

# APPENDIX

IN THE SUPREME COURT OF THE STATE OF DELAWARE

| | | |
|---|---|---|
| WILLIAM HENRY FLAMER,<br><br>Defendant Below,<br>Appellant,<br><br>v.<br><br>STATE OF DELAWARE,<br><br>Plaintiff Below,<br>Appellee. | § | No. 60, 1980 |
| BILLIE BAILEY,<br><br>Defendant Below,<br>Appellant,<br><br>v.<br><br>STATE OF DELAWARE,<br><br>Plaintiff Below,<br>Appellee. | § | No. 65, 1980 |

ORDER

This 6th day of July, 1983,

Upon application of all counsel in the above cases,

IT IS ORDERED:

(1) That supplemental briefs be filed in the above cases upon the following questions:

(A) What is the effect of the decision in Zant v. Stephens, _____ U.S. _____, 51 U.S.L.W. 4891 (June 22, 1983) upon the above captioned cases?

(B) Does this Court now have jurisdiction in the above captioned cases in view of the petition for certiorari now pending in the U.S. Supreme Court in each case?

(2) That the supplemental briefs on behalf of the appellants be filed by July 28, 1983; that the supplemental answering briefs on behalf of the State be filed by August 11, 1983; and that supplemental reply briefs on behalf of the appellants be filed by August 25, 1983.

(3) That, thereafter, oral argument will be directed if the Court desires it.

Chief Justice

IN THE SUPREME COURT OF THE STATE OF DELAWARE

| | | |
|---|---|---|
| WILLIAM HENRY FLAMER, | § | |
| | § | |
| Defendant Below, | § | |
| Appellant, | § | |
| | § | |
| v. | § | No. 60, 19[illegible] |
| | § | |
| STATE OF DELAWARE, | § | |
| | § | |
| Plaintiff Below, | § | |
| Appellee | § | |

ATTORNEY GENERALS OFFICE
DOVER, DELAWARE
RECEIVED
SEP 16 1982

Before HERRMANN, Chief Justice, McNEILLY, QUILLEN, HORSEY and MOORE, Justices, constituting the Court en Banc.

O R D E R

This 15th day of September, 1982,

Upon consideration of the briefs and oral argument of counsel in conjunction with a review of the records and transcripts of testimony pertaining to the guilt phase of trial, it appears to the Court that:

(1) Both the prosecution and defense have neglected to raise apparent issues, some of which rise to the level of federal and state constitutional magnitude;

(2) By reason of such neglect and failure additional briefing and argument before the Court is necessary;

(3) Counsel must file supplemental memoranda on the following:

(a) the effect of defendant's right to counsel after arraignment under the rule of Massiah v. United States,

377 U.S. 201 and its progeny;

(b) The effect of the modified "Christian Burial" speech given by the State Police Officer to defendant prior to taking the recorded confession; ~~(b)~~ Brewer v. Williams, 97 S.Ct. 1232 (1977).

(c) The effect of the Trial Judge's failure to instruct the jury at trial on the issue of voluntariness in defendant's giving of the recorded confession since defendant's testimony during the suppression hearing and at trial put that issue in sharp dispute. State v. Rooks, Del. Supr., 401 A.2d 1943 (1979);

(d) The effect of a jury instruction on the defense of alibi since that issue was removed from the case following his unassailable statements pertaining to his presence and participation at the time of commission of the crimes;

(e) Assuming plain error in admitting the recorded confession in evidence, the use of that statement in cross-examination. Harris v. New York, 91 S.Ct. 643 (1971).

(4) Counsel are to file cross memoranda on the listed issues on or before October 15, 1982. Answering memoranda may be filed within ten days thereafter, and counsel must be prepared

to argue at the November term those issues and all other matters the Court may wish to address pertaining to the guilt phase of trial.

IT IS SO ORDERED.

BY THE COURT:

John J. McNulty
Justice

IN THE SUPREME COURT OF THE STATE OF DELAWARE

| | | |
|---|---|---|
| WILLIAM HENRY FLAMER, Defendant Below, Appellant, | ) | |
| v. | ) | No. 60, 1980 |
| STATE OF DELAWARE, Plaintiff Below, Appellee. | ) | |

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE, IN AND FOR KENT COUNTY

# APPELLANT'S OPENING BRIEF


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Attorneys for Appellant


Dated: June 15, 1981

## SUMMARY OF THE ARGUMENTS

1. The statutory aggravating circumstance provided under 11 Del.C §4209(e)(1)(n) is unconstitutionally vague and thus does not provide the constitutionally required adequate guidelines in channelling the discretion of the sentencing authority in imposing the death penalty.

2. The trial court erred in allowing the jury to consider and find statutory aggravating circumstances in the penalty hearing under 11 Del.C. §4209(e)(1)(K0,(N) and (P) when the State failed to submit any evidence supporting such circumstances at the hearing.

3. The trial court erred in instructing the jury to consider as two separate statutory aggravating circumstances; that the murder was committed for pecuniary gain [11 Del.C. §4809(e)(p)], and that the murder was committed during the commission of robbery [11 Del.C. §4209(e)(j)(2)].

4. In recommending the imposition of the death penalty, the jury improperly relied upon a statutory aggravating circumstance which they did not find to exist beyond a reasonable doubt.

5. The trial court erred in instructing the jury that one of the statutory aggravating circumstances had been established beyond a reasonable doubt when considering the appropriate penalty.

6. The instructions by the trial court were insufficient in that they did not sufficiently make clear to the jury that they could recommend a life sentence even if they found the existence of a statutory aggravating circumstance.

7. The trial court's instruction to the jury concerning the review of the evidence by the court for sufficiency in imposing the death penalty corrupted the death sentencing process and was reversible error.

8. The trial court erred in failing to sequester the jury between the verdict of guilt and the penalty hearing and in failing to examine the jury as to any media or other exposure.

9. The failure of the trial court to require that the entire trial including sidebar conferences be reported by the court reporter in this capital case prevents this court from making the constitutionally required appellate review and necessitates that this sentence of death be vacated.

10. The imposition of a penalty of death upon this defendant violates both the prohibition against cruel and unusual punishment and the mandates of 11 Del.C. §4209(g)(2)(a) because this penatly is disproportionate and there is an insufficient number of cases arising under this statute to permit a finding that the sentence is proportionate.

11. The imposition of the death penalty upon a defendant convicted of murder in the first degree for an unintentional killing is an excessive punishment constituting cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.

12. The trial court erred in giving the defendant multiple punishments for the same offense.

13. The trial judge erred as a matter of law in denying the defendant's motion to suppress a recorded confession the defendant made at a time when the defendant was illegally detained by the police for the sole purpose of extracting a confession from him.

14. The trial judge erred as a matter of law in denying the defendant's motion to suppress certain evidence seized as a result of a warrantless search of his residence.

15. There was insufficient evidence to allow convictions on four counts of murder in the first degree when there are only two dead people.

16. There was insufficient evidence to allow a conviction of robbery in the first degree and two convictions of murder in the first degree with said robbery being the underlying felony.